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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

KIP P. WORDEN et al., Plaintiffs and Respondents, v. SOLID ROCK CONSTRUCTION, Defendant and Appellant.	A124514 (Humboldt County Super. Ct. No. DR060557)

INTRODUCTION

Defendant and appellant Solid Rock Construction (Solid Rock) appeals an attorney fee award in the amount of $164,421.16 in favor of plaintiffs and respondents, a group of five Solid Rock employees who prevailed in part against Solid Rock on their allegations that Solid Rock's work practices violated various provisions under the Labor Code. Solid Rock contends that the trial court abused its discretion in its award of attorney fees by incorrectly calculating the lodestar amount. In the alternative, Solid Rock contends the trial court abused its discretion in its award of attorney fees by finding that a downward adjustment in the lodestar amount was not required.[1] Finding no abuse of discretion by the trial court on either point, we affirm.

[1] Asserting that the trial court's order filed on August 15, 2008, entitled "Ruling Re: Request for Attorney Fees and Costs," established plaintiffs' entitlement to attorney fees, plaintiffs contend that this appeal should be dismissed as untimely because Solid Rock failed to appeal from that order. We disagree. Solid Rock properly and timely appealed from the Amended Judgment filed December 11, 2008 (Notice of Entry of Amended Judgment filed on January 12, 2009), the order setting *the amount* of attorneys fees. (See

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed their first amended complaint (FAC) against Solid Rock and various other parties on September 27, 2006. In the FAC, plaintiffs stated that they were employed by Solid Rock on a public works construction contract known as the "Rio Dell Water System Infrastructure Rehabilitation Project 2005" (project). Plaintiffs alleged that Solid Rock failed to pay them at the prevailing wage as a result of its misclassification of their work on the project. Plaintiffs further alleged that Solid Rock did not pay them for all hours worked, did not pay overtime wages, and did not allow them to take unpaid mealtime or rest breaks as required by law. Plaintiffs also alleged that they filed stop notices on the project based on Solid Rock's failure to pay wages owed to them in the following amounts: Kip Worden, $29, 531.15; Matthew Erickson, $11,357.64; Ronald Cross, $13,011.48; Raul Manjarrez, $16,799.54; and Kit Chambers, $9,981.48, totaling unpaid wages in the amount of $80,681.29 to these five plaintiffs.

On the basis of these allegations, the FAC asserted the following causes of action against Solid Rock: failure to comply with minimum wage and prevailing wage laws under Labor Code[2] sections 1194, 1771 and 1774 (First Cause of Action); a third-party beneficiary, breach of construction contract claim for failure to pay prevailing wage rates (Second Cause of Action); penalties for failure to pay wages claimed by plaintiffs under section 203 (Third Cause of Action); liquidated damages under section 1194.2 for failure to pay prevailing wages (Fourth Cause of Action); failure to afford mandatory rest breaks and meal periods in violation of sections 226.7 and 1198 (Eighth Cause of Action); unfair business practices in violation of Business and Professions Code sections 17200 et seq. (Ninth Cause of Action); and Unjust Enrichment (Tenth Cause of Action). In their

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P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority (2002) 98 Cal.App.4th 1047, 1053 [stating that "if a judgment determines that a party is entitled to attorney's fees but does not determine the amount, that portion of the judgment is nonfinal and nonappealable"].)

[2] Further statutory references are to the Labor Code unless otherwise noted.

complaint, plaintiffs sought recovery of unpaid wages, accrued interest and penalties, and attorneys fees and costs.

Bifurcated trial proceedings commenced on October 31, 2007. Issues of liability were tried before a jury. All five plaintiffs testified at trial. The jury received a special verdict listing the following questions in regard to each of the five plaintiffs: (1) Did [plaintiff] prove that the time records maintained by Solid Rock Construction, Inc. do not reflect all of the hours actually worked by him?; (2) Did [plaintiff] prove that he did not receive a 30-minute meal period?; and (3) Did [plaintiff] prove that Solid Rock Construction, Inc. did not authorize and permit him the opportunity to take rest breaks? The jury was asked to provide a "Yes" or "No" answer to each of these questions. The special verdict form also included follow-up questions should the jury answer "Yes" to any of the three questions listed above. The follow-up questions allowed the jury to quantify the extent of the violation identified by any "Yes" answer.

The jury returned its special verdict on November 7, 2007. The jury concluded that all five plaintiffs proved they did not receive 30-minute meal periods. In its response to the follow-up question on the extent of the violation, the jury responded that plaintiffs proved that they did not receive a 30-minute meal period on the following number of days; Kip Worden, 156 days; Matthew Erickson, 47 days; Ronald Cross, 56 days; Raul Manjarrez, 133 days; and Kit Chambers, 42 days. The jury returned "No" answers to the other two questions, concluding that all five plaintiffs failed to prove that the time records maintained by Solid Rock did not reflect all of the hours actually worked by them, and failed to prove Solid Rock did not authorize and permit them the opportunity to take rest breaks.

Following the jury trial, a bench trial was scheduled for December 17, 2007, to adjudicate the following issues: (1) whether plaintiffs were misclassified resulting in lower wage rates than required for the type of work they performed; (2) an accounting on Solid Rock's misclassification of plaintiffs' pay scales and on the 30-minute, meal time issue decided in plaintiffs' favor by the jury; and (3) whether Solid Rock should pay penalties under section 203 for failure to pay wages. Plaintiffs' trial brief prepared in

anticipation of the bench trial shows that plaintiffs claimed the following sums in wages for denied meals, wages for misclassification and interest owed thereon: Kip Worden, $13,845.91; Matthew Erickson, $2,397.24; Ronald Cross, $4,630.32; Raul Manjarrez, $13,073.13; and Kit Chambers, $3,372.80. In addition, each plaintiff requested penalties under section 203[3] of $353.44 per day for 30 days, or $10,603.32 per plaintiff for total penalties of $53,016. Plaintiffs also asserted their right to attorneys fees and costs under section 1194[4] should they prevail.

The bench trial scheduled for December 17, 2007, was continued until February 4, 2008. On February 4, 2008, the parties appeared and announced that the case had settled with the matter of attorney fees and costs reserved. Plaintiffs' attorney stated that the parties agreed to settle all issues in exchange for payment by Solid Rock in the amount of $40,000. The total sum of $40,000 was comprised of *$15,000*[5] in unpaid wages and $25,000 in penalties under section 203. Of the $15,000 in unpaid wages, $10,000 was for plaintiffs' meal period claim and $5,000 was for their misclassification claim. The unpaid wage total of $15,000 was to be apportioned between plaintiffs as follows: Kip Worden, $5,565.17; Matthew Erickson, $963.54; Ronald Cross, $1,861.09; Raul Manjarrez, $5,254.56; and Kit Chambers, $1,355.65. While acknowledging that the settlement reserved the issue of attorney fees and costs, Solid Rock's counsel stated that "we're not waiving our right to claim that we were prevailing parties [for purposes of attorneys fees] on a portion of the claims at trial."

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[3] Section 203 provides in pertinent part: "If an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days." (§ 203, subd. (a).)

[4] Section 1194 provides in pertinent part: "[A]ny employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." (§ 1194, subd. (a).)

[5] The amounts assigned to the individual plaintiffs add up to $15,000.01.

On April 25, 2008, judgment for wages and penalties was entered against Solid Rock in the amount of $15,000 as "wages with statutory deductions," and $25,000 as penalties and interest. The judgment also stated, "Parties may move for fees and costs upon entry of this judgment."

Plaintiffs filed such a motion on July 2, 2008, seeking a total of $196,626.16 in attorney fees and costs. This total amount claimed was comprised of 494.8 hours of attorney time at $350 per hour, for a total of $173,180 in attorney fees; 227.75 hours of paralegal time at $90 per hour for a total of $20,497.50 in paralegal fees; and $2,948.66 in costs. Plaintiffs stated they would not seek a multiplier unless the trial court reduced the number of hours billed based on results achieved, in which case they asked for multiplier of 1.75.

Solid Rock filed a motion in opposition to plaintiffs' motion for attorney fees.[6] In its opposition motion, Solid Rock contended that the hourly fee rate charged by plaintiffs' counsel was excessive; that plaintiffs' counsel improperly referred to settlement negotiations in justifying the fee award claimed; that the paralegal fees claimed by plaintiffs were excessive; and, based on plaintiffs' failure to prevail on all claims, a downward adjustment of 50% was appropriate in the amount of attorney fees claimed by plaintiffs.

Plaintiffs filed a Reply Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Reasonable Award of Attorneys' Fees, Costs and Expenses (reply brief). In the reply brief, plaintiffs' counsel acknowledged that at trial plaintiffs "only succeeded in the meal claim and not for off-the-clock work." In recognition of this trial outcome, plaintiffs' counsel stated he was "willing to discount his fees for trial by 50%." Counsel stated that "[p]rior to the granting of the motion to bifurcate and the beginning of trial, plaintiffs litigated, investigated and prepared for a trial of all issues including the misclassification claims. Looking at the fees, from October 29, 2007 through November 6, 2007 [the duration of the trial] 77.5 attorney hours were spent. . . .

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[6] Solid Rock did not, as previously intimated in court, file a motion asserting its own entitlement to attorney fees as a prevailing party.

Therefore, plaintiffs' counsel is willing to discount 38.75 attorney hours." Plaintiffs reduced the attorney hours claimed for work completed to date from 494.8 hours to 452.10 hours.[7]

On August 15, 2008, the trial court issued an order ruling on plaintiffs' request for attorney fees. In pertinent part, the trial court ruled as follows: "The court finds that the attorney fee rate of $350 per hour requested by plaintiffs' counsel is reasonable, and adopts that rate as the beginning step in determining the total amount of fees to be awarded. With regard to the paralegal rate, the court finds a lack of proof as to the paralegal status of the persons hired by counsel, and further finds that much of the work performed, particularly at trial, should not be paid, as being clerical in nature. Such work should be absorbed in the billing rate of plaintiffs' counsel. [¶] The next question is whether the hourly rate should be adjusted either up or down, based on the facts of this case and the result obtained. [¶] The court finds no reason for an upward adjustment, as there were no novel questions presented, and the case was not very strong, as evidenced by the result. [¶] The jury found that the plaintiffs did not prove their claims regarding defendant's time records, failed to prove working hours for which they were not paid, failed to prove that defendant did not authorize or permit the opportunity to take rest breaks, but only found that they did not receive a 30-minute meal period. [¶] In all other respects the request for fees and costs is granted. Counsel shall meet and confer regarding the mathematical calculation of the attorney fees."

On December 11, 2008, the trial court entered an amended judgment stating that plaintiffs "shall have a judgment as follows: 1. $15,000 as wages; 2. $6,858.24 per Memorandum of Costs CCP §§ 1032, 1033.5; and 3. $164,421.16 as statutory attorneys' fees and costs. The total judgment amount is $186,279.40." Notice of Entry of Amended Judgment was filed on January 12, 2009, and Solid Rock thereafter filed a timely notice of appeal on March 6, 2009.

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[7] In addition, respondents requested 11.25 hours for the reply brief. It appears the trial court awarded only 9.25 hours, see *post*, footnote 11.

DISCUSSION

A. Applicable Legal Standards

Trial courts employ the lodestar adjustment method to compute an award of attorney fees to the prevailing party on a claim under the Labor Code. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135-1136 (*Ketchum*); *Serrano v. Priest* (1977) 20 Cal.3d 25, 48-49.) In the first stage of the lodestar adjustment method, the trial court determines the reasonable hourly rate of compensation for counsel, which it then multiplies by the number of hours the court finds were reasonably spent preparing the case, to obtain the lodestar figure. (*Ketchum, supra,* 24 Cal.4th at pp. 1131-1132.) The lodestar figure is the "basic fee for comparable legal services in the community" (*id.* at p. 1132) based upon the " ' " hourly amount to which attorneys of like skill in the area would typically be entitled." ' (Citation.)" (*Id.* at p. 1133.)

At the second stage, the trial court may adjust the lodestar figure upwards or downwards by the application of a multiplier after considering other factors concerning the lawsuit. (*Ketchum, supra,* 24 Cal.4th at p. 1134.) Among the factors the trial court may consider in deciding whether to apply a multiplier are "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." (*Id.* at p. 1132.) Application of a multiplier to the lodestar is designed "to fix a fee at the fair market value" for the legal services provided by determining, retrospectively, "whether the litigation involved a contingent risk or required extraordinary legal skill. . . ." (*Id.* at p. 1132.) However, "the trial court is not *required* to [apply a multiplier] to the basic lodestar figure for contingent risk, exceptional skill, or other factors," but if it does so it must avoid double counting and "should not consider these factors to the extent they are already encompassed within the lodestar. . . ." (*Id.* at pp. 1138-1139.)

We review a trial court's award of attorney fees under the lodestar adjustment method for abuse of discretion. (*Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512.) " 'The trial court's decision will only be disturbed when there is no substantial evidence

to support the trial court's findings or when there has been a miscarriage of justice. If the trial court has made no findings, the reviewing court will infer all findings necessary to support the judgment and then examine the record to see if the findings are based on substantial evidence.' (Citation.)" (*Ibid.*) Substantial evidence is evidence that is of "ponderable legal significance," i.e., reasonable, credible and of solid value. (*Ibid.*)

B. Analysis

Solid Rock contends that the trial court's attorney fee award amounts to an abuse of discretion because (1) the rate of $350 per hour used to calculate the lodestar amount is unreasonably high and there was " 'no evidence' to support such a rate." We disagree.

Regarding evidence on the attorney fee rate set by the trial court, plaintiffs' counsel, Tomas Margain, submitted a declaration in support of attorneys fees. Margain requested an hourly rate of $350 per hour based on the fact that he has ten years experience in the field of "wage and hour and class action litigation." Counsel also stated that he had been awarded attorney fees of $350 per hour by courts in three different counties and that the current market rate for a plaintiffs' lead attorney of his experience is over $400 per hour. Plaintiffs also submitted the declaration of Mark Talamantes, a partner in a plaintiffs' law firm in San Francisco specializing in employment law. Talamantes stated that the hourly rate of $350 claimed by Margain was "well below the market rate" for prevailing plaintiff's attorneys representing workers in employment cases. Talamantes cited six wage-and-hours cases his firm had recently settled in which courts in different counties had approved hourly rates ranging from $410 to $450 per hour. We presume that in selecting an hourly rate for the lodestar calculation, the trial judge evaluated the evidence before him in light of his experience and knowledge about the value of legal services prevailing in his community. (See *Ketchum, supra,* 24 Cal.4th at p. 1132 ["The ' "experienced trial judge is the best judge of the value of professional services rendered in his court, and . . . it will not be disturbed unless the appellate court is convinced that it is clearly wrong." ' (Citation.)"].) Thus, nothing in the record compels us to disturb the trial court's discretionary determination that $350 per hour is the

appropriate " ' " hourly amount to which attorneys of like skill in the area would typically be entitled." ' (Citation.)" (*Ketchum, supra,* 24 Cal.4th at p. 1133.)

Further, based upon the fact that plaintiffs were only partially successful on their claims, Solid Rock contends the trial court abused its discretion in determining *the amount* of attorney fees.[8] In this regard, Solid Rock argues in the alternative that (1) either the trial court should have reduced the attorney hours included in the lodestar sum to reflect plaintiffs' partial success on their claims or, (2) the trial court should have adjusted the lodestar amount downwards (i.e., applied a multiplier of less than 1) to reflect plaintiffs' partial success on their claims. We address each of these contentions in turn.

First, Solid Rock contends the trial court abused its discretion by calculating the lodestar sum based on 452.1 attorney hours billed by plaintiffs' counsel. Solid Rock complains that this figure should have been reduced because plaintiffs alleged seven causes of action against Solid Rock in their complaint, and only partially prevailed on three of those claims. Solid Rock also complains that the 161.1 hours billed by plaintiffs' counsel for time spent on jury and court trials was unreasonable in comparison to "only 114.25 hours [] billed for preparation of pleadings and discovery." In Solid Rock's view, "approval of 452.1 hours requested by plaintiffs was not reasonable because much of that time was related to unsuccessful causes of action and the excessive amount of time spent on trial preparation was not reasonable."

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[8] Solid Rock does not dispute that plaintiffs are prevailing parties for purposes of attorney fees under section 1194. (See *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 153-154 [noting that plaintiffs may be considered "prevailing parties" for purposes of attorneys fees "if they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought in bringing suit" and that the prevailing party analysis is distinct from the issue of the amount plaintiff is entitled to recover as a reasonable fee]; see also *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 647 [" 'Whether an [attorney fee] award is justified and what amount that award should be are two distinct questions, and the factors relating to each must not be intertwined or merged.' (Citations.)"].)

In support of the above assertions, Solid Rock cites *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407 (*Harman*).[9] According to Solid Rock, *Harman* stands for the proposition that "where a plaintiff achieves only partial success, the trial court should only award fees which are reasonable in light of the result obtained." Although Solid Rock does not analyze the facts here against the principles set forth in *Harman*, we assume that Solid Rock is attempting to mirror the appellant's claim in *Harman* that the fee award is "excessive, particularly when compared to the 'limited success' of respondent in the 'litigation as a whole.' " (*Id.* at p. 415.)[10]

The *Harman* court noted that under *Hensley, supra,* " 'the initial lodestar calculation should exclude "hours that were not 'reasonably expended' " ' in pursuit of successful claims. (Citations.)" (*Harman, supra,* 158 Cal.App.4th 417.) Attorney fees for work on "unsuccessful and unrelated claims" should not be included in the lodestar

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[9] Solid Rock also cites *Winick Corp. v. Safeco Insurance Co.* (1986) 187 Cal.App.3d 1502, 1508 (*Winick*)) for the proposition that "time spent on unsuccessful claims should be omitted from the lodestar amount." The *Winick* court did not discuss the lodestar concept at all. Rather, the principal issue addressed by the appellate court in *Winick* was whether, in an action by a subcontractor against a surety company on its payment bond, the surety's success in obtaining a dismissal with prejudice for failure to timely serve the summons qualified it as "prevailing party" under the applicable fee statute. (*Id.* at pp. 1506-1508 [concluding surety was a prevailing party].) Regarding the amount of attorney fees awarded to the surety, the court rejected the subcontractor's contention that the fee award was "too much on its face for a defendant's work on a case which is dismissed for failure to timely serve the summons." (*Id.* at p. 1509.) Solid Rock does not explain how *Winick* controls the issue presented here.

[10] *Harman* was the second appeal concerning the reasonableness of a fee award for an employment discrimination claim seeking damages under the federal civil rights act, 42 United States Code section 1983 et seq. On the first appeal, the appellate court remanded because " 'the trial court did not properly consider the standards governing the award of attorney fees under section 1988' as articulated in *Hensley v. Eckerhart* (1983) 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 [*Hensley*]. (Citation.)" (*Harman, supra,* 158 Cal.App.4th at p. 413.) For purposes of discussion only, we shall apply the principles articulated in *Harman* to the facts of this case, but in doing so pass no opinion on whether state trial courts are obligated, as a matter of law, to follow the methodology articulated in *Hensley, supra,* when determining the reasonableness of a attorney fee awarded under a California remedial statutory scheme such as the Labor Code.

amount, and unrelated claims are those " 'based on different facts and legal theories.' " (*Ibid.*) However, fee apportionment between successful and unsuccessful claims is not required " 'where plaintiff's various claims involve a common core of facts or . . . are so inextricably intertwined that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units.' (Citation.)" (*Ibid.*)

In this case, plaintiffs' various causes of action and legal theories share a common core of facts. All were all based on Solid Rock's alleged employment practices during the execution of a public works project, namely that Solid Rock failed to pay overtime, give employees rest and meal breaks, and misclassified pay scales. Thus, apportionment of attorney fees between plaintiffs' successful and unsuccessful claims is not required here. (*Harman, supra,* 158 Cal.App.4th 417.)

Nevertheless, *Harman* requires additional analysis where, as here, "successful and unsuccessful claims are . . . *related*." (*Harman, supra,* 158 Cal.App.4th 417, quoting *Hensley, supra,* italics added.) In this second step, the court must evaluate the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.' (Citation.)" (*Ibid.*) In conducting the analysis, a trial court can either " 'attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success.' (Citation.)" (*Id.* at p. 418.) A trial court makes these determinations in the broad exercise of its discretion, and an appellate court's review in these matters is "severely constrained." (*Ibid.*)

Here, we cannot say that judged against the principles set forth in *Harman, supra,* 158 Cal.App.4th 407, the trial court abused its discretion in accounting for plaintiffs' limited success when deciding the fee amount. Plaintiffs' counsel provided detailed billing records showing that between August 2006 and July 2008 he devoted 494.8 hours to work on the case, up to and including the filing of the fee motion itself. (*Horsford v. Board Of Trustees Of California State University* (2005) 132 Cal.App.4th 359, 396 [counsel's billing records are entitled to a presumption of credibility, at least "in the absence of a clear indication the records are erroneous.") Not all of those hours were included in the lodestar. The lodestar amount shows that fees were awarded for 452.10

hours for time spent prior up to and including the attorney fee motion.[11] This reflects a reduction of 42.7 hours in the attorney hours initially claimed by counsel. Furthermore, the trial court allowed no compensation at all for over $16,000 in paralegal costs expended on the case by plaintiffs' counsel. These reductions and disallowances constitute substantial evidence that the trial court accounted for plaintiffs' partial success in setting the hours for the lodestar calculation. Moreover, despite Solid Rock's protestations to the contrary, counsel's billing records do not evidence any major inefficiencies or duplicative efforts that would have compelled the trial court to further reduce the lodestar. (See *Ketchum, supra,* 24 Cal.4th 1131-1132 [stating that attorney hours "*reasonably spent*" means that time spent "in the form of inefficient or duplicative efforts is not subject to compensation"].) On this record, therefore, we cannot say the trial court abused its broad discretion in accounting for plaintiffs' partial success with respect to the attorney hours included in the lodestar sum.

Finally, we reject Solid Rock's alternative proposition that if the trial court did not abuse its discretion in accounting for plaintiffs' partial success in the lodestar, then it necessarily abused its discretion by failing to adjust the lodestar amount downwards to reflect plaintiffs' partial success on their claims. In deciding whether to apply a multiplier the trial court may consider such factors as "(1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, (4) the contingent nature of the fee award." (*Ketchum, supra,* 24 Cal.4th at p. 1132.) These factors are not exclusive because the trial court may also consider "other circumstances in the case" such as "the success or failure" achieved in the litigation. (*PLCM Group, Inc.*

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[11] The amended judgment shows $164,421.16 for statutory attorneys fees and costs. Costs amounted to $2,948.66, meaning that attorneys fees were $161,472.50, representing 461.35 hours at $350 per hour. This is actually $700 less than the attorneys fees claimed in respondents' reply brief. In the reply brief, respondents claim 452.10 hours at $350 per hour for litigation to date, reflecting a 50% reduction in trial hours, plus 11.25 hours at $350 per hour for the reply brief itself, yielding a total of $162,172.50 Thus, we assume the trial court awarded respondents 9.25 hours for the reply brief, not 11.25 hours as claimed.

v. Drexler (2000) 22 Cal.4th 1084, 1096; *Californians for Responsible Toxics Management v. Kizer* (1989) 211 Cal.App.3d 961, 974 (*Kizer*) [noting that lack of success may be an appropriate adjustment factor in setting attorney fee].)

In its multiplier determination, the trial court considered plaintiffs' relative lack of success on their claims, noting that plaintiffs had failed to prove two of its claims to the jury and had only proved the claim that Solid Rock failed to provide 30-minute meal periods. However, the trial court's decision not to adjust the lodestar amount downwards based on this factor does not amount to an abuse of discretion when viewed against the other *Ketchum* factors, in particular the contingent nature of the fee. Indeed, it has long been recognized that the contingent and deferred nature of the fee award in a case with statutory attorney fees justifies *enhancing* the lodestar amount. (See *Ketchum*, *supra*, 24 Cal.4th at p. 1133 [noting that an attorney "who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases"].) In other words, faced with factors justifying either a negative multiplier (relative lack of success) or a positive multiplier (contingent nature of the fee), the trial court decided that no multiplier was appropriate. We cannot say this amounts to an abuse of discretion.[12]

DISPOSITION

The amended judgment is affirmed. Plaintiffs shall recover their costs and reasonable attorney fees on appeal, the amount of which shall be determined by the trial court. (See *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500 ["A statute

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[12] In its reply brief, Solid Rock suggests that we should reverse the fee award because it is so disproportionate with the success gained that it "shocks the conscience." The fee award here is neither strikingly disproportionate nor shocking to the conscience. Fee awards under remedial statutes are not assessed on "strict proportionality" to damages obtained. (See *Harman*, 158 Cal.App.4th at p. 419.) Thus, *Harman* affirmed an attorney fee award of "$1.1 million [in attorney fees] on a recovery of $30,000" (*id.* at p. 415), a far greater disparity than any here between approximately $160,000 in attorney fees on plaintiffs' recovery of $40,000.

authorizing an attorney fee award at the trial court level includes appellate attorney fees unless the statute specifically provides otherwise"].)

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.